

Creditor Enforcement, Secured Property and the Insolvency Dynamic

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Well, good afternoon everybody. I think I'm going to try and enliven things up a little bit, knowing that I'm presenting against the weight of the digestive forces working on a very good lunch and that you are all in danger of falling asleep.

The title of the paper is called "Creditor Enforcement, Secured Property and the Insolvency Dynamic" and any of these words tend to send people to sleep. What do we mean by creditor enforcement (yawn), secured property (yawn), insolvency (especially big yawn)? Plus, you might be wondering, of course, what the connection is with *héritages*, with real property, with *corps de biens-fonds* and all of these things. Well, I will just give you a little insight into what I have become interested in of late, particularly since becoming a Visiting Professor here and getting to grips with the arcana of Jersey company, security and insolvency law and realising the very ancient roots of the procedures here, particularly those in the customary law that arose from the cases and judicial practice and that have been only partially codified in statute. Now, there is a French author, the French historian Jérôme Sgard,¹ who suggests that insolvency as a discipline really comes into being in the Middle Ages: as a result, we all know that the Italians invented everything! The Italians invented banks, promissory notes, cheques and the idea that you could take a piece of paper from Rome to Paris and receive payment against it. They also invented double-entry bookkeeping and the other paraphernalia of keeping accounts and banking.

What is less known perhaps is the rediscovery of the ancient roots of insolvency, because, believe it or not, the Greeks had insolvency, the Romans had insolvency: they were after all major trading empires. In fact, one of these mediaeval procedures is a rediscovery in a way, being first introduced by Augustus, one forgets exactly when, but rediscovered sometime in the 11th-12th centuries in the universities of Northern Europe, particularly Bologna, Pisa and Padua, where they looked through the old digests and collections of Roman Law and asked whether there were any things in the books that could serve as lessons for today, today being, of course, the 12th century. So, around about 7-800 years ago, one of these old procedures, known as the *cession de biens*, the *cessio bonorum* (to use the Latin term), was in effect revived to serve as a type of insolvency procedure generally available to traders. There was also a non-trader type of insolvency which comes to be known as the *remise de biens*, which Le Geyt acknowledges is directly derived from French curial practice.²

Now, Jérôme Sgard adds to these two a further two forms of procedures, the bankruptcy, in so far as bankruptcy can be distinguished from other procedures like *cession* and *remise*, and also criminal procedures that have to deal with the penal side of bankruptcy, as insolvency has always had this quasi-criminal element. This is because lots of the things that you would do in the context of being indebted would be things that ultimately would be fraud on the creditors. So, examples may be: hiding your assets away and fleeing the country in order to evade enforcement against your moveables (because your immoveables tend to stay behind, while your movables tended to go with you, perhaps assisted by a very canny Italian bank which gave you a very large promissory note in exchange for title to the moveables).

¹ J. Sgard, "Bankruptcy, Fresh Start and Debt Renegotiation in England and France (17th-18th Century)", Chapter 14 in T. Safley (ed), *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe* (2013, Routledge, London).

² P. Le Geyt, *Privilèges, Loix et Coustumes de L'Isle de Jersey* (c. 1698) (reprinted 1953, Bigwoods Ltd for the States of Jersey, St Helier), Livre IV, Titre VII, Article 1, which speaks of the procedure being akin to the French one (*à peu près comme on obtient en France*).

So, of the four procedures that Jérôme identifies as being medieval law creations, two of them arrive in Jersey. Now, Lévy and Castaldo, noted French experts on the history of the civil law,³ suggest that there is a radial diffusion of customs in France, perhaps emanating from the major commercial centres like Paris and Lyon, with these eventually finding their way to the westernmost reaches of the country, including Normandy. It's suggested that around about 1450, at a time when, in the High Middle Ages, plenty of things are happening (we're right in the middle of the second Hundred Years War), that ultimately that is when the final shape of the customary laws of the various provinces is formed. Now, as we've just heard Meryl say, all the way from the Caymans, some parts of this customary law never make it through the diffusion process. Some parts of the customary law are changed as they are diffused throughout France. Now, *cession* and *remise* do arrive in Jersey, although we're not entirely sure when they do.⁴ I'm indebted here, however, to Stéphanie Nicolle for an observation made in the Jersey and Guernsey Law Review,⁵ suggesting that there are instances of *remise* that can be traced as far back as the 1590s to 1600s, so we know that they're roughly around at the time a little after the end of the diffusion occurs and ultimately the various customs of the provinces are fully shaped.

In the way that they arrive in Jersey and are adapted to local circumstances is where we encounter the effect of the real property dynamic on the Island. As they develop, we understand why it is that we term the insolvency procedures here as having a real property root, as they reveal the concern of local courts in local instances in relation to what happens to the land. So, the development of insolvency procedures is very much tied up to prevailing views as to the importance of real property. So, again, perhaps echoing something that Stéphanie referred to earlier when looking at how the law reflected ideals of family protection, keeping property within the family and within the lineage.

Just to update you on the range of procedures that are available: *désastre*, which is the modern fully-formed insolvency procedure in Jersey, begins roughly at the end of the 18th Century as an alternative for creditor claims against moveables. It's a procedural development by the courts which began to notice large numbers of creditor claims against the same debtor and decided that these things would be better heard on a single occasion. So you'd have a *passation des causes*, a single event at which a decision would be made in relation to the various claims, and it was convenient to lump these together and to deal with them. Now, why *cession* and *remise* in particular attract this real property component is, in the case of the *remise*, the pre-qualification for entry. I know that many of you here will already be familiar with the way that Jersey bankruptcy law has developed and of course, in relation to the *remise de biens*, the essential pre-qualification for entry into this procedure is that you are formally doted *en héritage*, that you do have real property.

One of the reasons why this is the case is perhaps because *remise*, unlike *cession*, which has far more ancient roots and can trace its ancestry back to Roman law, is a development of the French Crown which essentially said to fortunate people: "*Well, we will suspend the effect of court claims against you and creditor enforcement by giving you a lettre de répit (a letter of respite), by which you can simply show to anyone who comes and attempts to enforce against you that you have the protection of the Crown for a certain period (generally limited).*" Ultimately, the *lettre de répit* is codified in France in the Ordinance of 1673, at which period the courts take over the administration of the *lettre de répit* process from the Crown, so, in a sense, "judicialising" it, thus making it more amenable to court decision making. Now, at some period prior to this, prior to the Ordinance being passed, we find *remise* in Jersey attaching itself to the importance of having real property as a qualification. The logic may well be this: that the person who is most likely to benefit, the non-

³ J-P Lévy and A. Castaldo, *Histoire du Droit Civil* (2010, Dalloz, Paris).

⁴ Reference is made to a case dating back to 1592 in C. Le Gros, *Traité du Droit Coutumier de l'Île de Jersey* (1943) (reprinted 2007, Jersey and Guernsey Law Review Ltd, St Helier), at 299.

⁵ S. Nicolle, Letter to the Editor (2011) 15(2) JGLR.

trader, who is in financial difficulties because they can't quite raise the money (they've perhaps overextended themselves in terms of spending), may well have a sizeable asset that is not, at the moment, very productive and that will, of course, be the real property. So, giving a respite from enforcement for a period of up to a year would enable the consolidation of debts, the treatment of these debts, perhaps rather cleverly to re-calibrate the borrowing, perhaps to find another lender, perhaps to pay off from the fruits of that land some of the existing debt so as to minimise outgoings. So, you've got the *remise* if you were already quite asset rich (albeit cash poor). And the most important asset there, of course, would be your land. It is still the case today that you only get a *remise* and the court is injuncted (prevented) from giving you the benefit of a *remise* unless the property that you have, which must include real property (although it may also include movables), is sufficient to pay off the secured creditors, as well as give a dividend, no matter how small, to the unsecured. So, the emphasis there is really on pleasing secured creditors, who, of course, will be secured mostly in relation to the real property.

Now, returning to *cession de biens*, although you might see *remise de biens* as being only incidentally connected to insolvency, *cession de biens* is very much rooted in real property. But, there again, I think one could also view *cession de biens*, in the way that is applied in Jersey, as having incidentally acquired a real property overtone, because the *cession de biens* procedure, which still exists in a number of civil codes (you find it in the French Civil Code, the Québec Civil Code, the *Code Civil Mauricien*, which I have had reason recently to consult), is a procedure by which the debtor can simply put any property into the creditors' hands and literally wash their hands of matters by giving to the creditors the means by which they can satisfy themselves in relation to the claims that they have.

Now, *cession de biens* in Jersey also acquires this overtone, the debtor, having elected to put his property in the hands of the creditors, being thereby immunised against further claims. So, the old *décret* system, which was superseded by the *dégrèvement*, an improvement in the 1880s, was literally the order by a court that the debtor be admitted to make *cession de biens* and that the making of a *cession de biens* transferred a property into the hands of the creditors and that was the end of the matter. The debtor acquired immunity; the debtor acquired a discharge. The problem comes, though, in how this property is then dealt with because you've got a massive property being given into the hands of the creditors. What are they going to do with it? And this is where the land law connection really kicks in, because the only procedure that was available at the time, one of the very few instances of an autochthonous procedure to deal with land and security over land, is the *décret* and, later, the *dégrèvement* process into which it mutates. The last *décret* allegedly occurred in 1917 so we may never see another one again. *Dégrèvement* is alive and kicking: there were three in February earlier this year, a few more recently, so it's still a popular thing.

So, the procedure that closes off the *cession de biens*, the making of the decree or the making of the order, may be seen, in fact, as a gateway to opening other procedures: other procedures which are specifically designed to deal with the property and, looking at the sequence in which these other procedures were adopted, the essential focus there is very much on real property. Historically, the *décret* would only deal with real property and, in its application, was limited to real property which was acquired largely before 1880. The *dégrèvement* applies to property which was acquired after the entry into date of the relevant law.⁶ Why does it have this overwhelming flavour? Well, when you look at what happens to moveables, it's quite clear. Moveables are incidental to the process. There was a procedure known as *liquidation* (liquidation, of course), which was introduced alongside *dégrèvement*, which didn't really function and was then replaced itself in 1915 by another one called *réalisation* (realisation), basically to liquidate the moveable part of your estate. I'm told that in practice these things are almost never used: *réalisation* is very, very rare. What tends to happen is

⁶ *Loi (1880) sur la propriété foncière.*

that the *dégrèvement* process is opened and, if there are moveables, these are dealt with incidentally as part of that process or alongside that process rather informally.

So, what would happen if you had an estate entirely consisting of moveables? This is after all, historically, the shift in the pattern of commodification of assets into money, which results in the ability to make business. Once upon a time, people only had land and land really was the root of being able to raise money for business. What happens if you don't have land, you only have moveables, well: that's the reason why, in England and Wales, the floating charge was invented, why debentures were created. The same process can be seen at the root of the *désastre* procedure, which, until changes in 1990,⁷ was exclusively available for moveables or only available in the case of moveables. So, you had a clarification of processes. *Remise* and *cession* classically dealt with the real property interests. *Désastre*, as it began, was the *riposte*, the answer, to what to do with estates which consisted of moveables. In relation to corporate liquidation, introduced by the 1991 law,⁸ there, in the case of the winding up of companies, it refers to all types of property, so no differentiation there.

Now, I'm going to try and gallop through a focus on *cession de biens*. There are two ways in which it can happen: voluntarily (I decide to make *cession de biens*, I go to court and I say this is my intention) or, more commonly (since it's very rare to have a voluntary *cession de biens* or *cession générale*, as it is also known), you normally get pushed into it by a creditor on the basis of an order being made against you, usually a judgement being obtained for a sum of money. Then, in the absence of payment, the creditor initiates what is known as an *adjudication de renonciation*, by which the debtor's property is adjudged to be renounced or, in other words, put into the hands of the creditors. So, this is one of the access points for creditors, because, believe it or not, in corporate liquidation, creditors don't have any action rights, whether in the case of summary (thus solvent) or creditors' (insolvent) winding-up. Only the company itself can decide to put itself into insolvency. So, there's no route in for creditors in corporate procedures. Similarly, there's no route in in *remise de biens*, because that remains at the election of the debtor. It's only in *cession de biens*, in the involuntary variant, that the creditor can push and, of course, a creditor can also push in *désastre*, provided it has a liquidated debt of at least £3,000 that is outstanding.

Now, as stated before, the *cession de biens* is a gateway procedure: whether it comes through voluntary or involuntary routes, you end up in the same place. Once the order is made, then the "quasi-liquidation" procedure is opened, in this case a *dégrèvement*. I'm indebted to Richard Falle for having described what *dégrèvement* is, so I need not trouble you with that. What I can do is to mention what are some of the problems for *dégrèvement*, some of which Richard has also referred to. As a procedure, one has to wonder whether in fact, after the litany that I'm about to embark upon, this procedure is at all human rights compliant. The first problem that it has is the independence of the attorneys that are generally appointed to take care of the debtor's property, pending the *dégrèvement* hearing. One of them is usually the creditor's lawyer. Granted, of course, that all lawyers by their oath owe responsibilities to the court and are generally engaged in the administration of justice, but they are here representing their client, who is after all the creditor. So, where are their loyalties, truly? Similar arguments are made in relation to receivers in the context of United Kingdom receiverships.

There's also the timetable for the procedure. Once upon a time in an island, two centuries ago, when everyone knew each other and court hearings tended to be less formal in their summoning, you knew then rapidly who was indebted. When procedures arose, the fact that procedures took place within 4-6 weeks post the *décret/dégrèvement* is something that can be understood. These

⁷ The passing of the Bankruptcy (*Désastre*) (Jersey) Law 1990.

⁸ The Companies (Jersey) Law 1991.

days, well, one has to appreciate the possibility that things are far more complex, but the saving grace comes in the shape of a case called *Re Burby*,⁹ which allows a court to adjust that procedure, but it's not in the statute, because the statute says 4-6 weeks.

Another problem with the process itself is it is designed to "discumber" (or "disencumber") security. I prefer the term "disencumber", because it means taking off the security, which in fact is attached to the land (it's almost "soldered" to the land).¹⁰ That means that you have to call everyone who has ever transacted in relation to that land. The problem with this is, not that they are called in reverse date order of the creation of their security with the unsecured creditors right at the very beginning, but that they have to take or they lose their right and that is the issue. So, when we deal with land, which is in multiple occupation, or which has been sub-divided or with land which itself is a sub-division of another piece or when servitudes are created in favour of others or when you have rights of shared ownership in common property (adjoining walls and all that), all these people have to be called. If they don't take when called, what is the effect on the real right that they have: do they lose it in every instance? The courts have evolved a practice of ignoring or not calling persons whose rights essentially don't need to be effected by the *dégrèvement*, but that is not what the statute says.

A further bizarre thing about this procedure is, that if you go all the way up the *dégrèvement* (as Richard Falle says: it's a speculative venture), there is a point at which it becomes useful to take the property, because the amount of the pre-existing security, the security higher in rank than you, is less than the value of the land. Very unlikely these days, of course, with declining property values, although the average transaction in Jersey, I am told, hovers around the half a million pound mark anyway, so "declining values" is a relative thing. But, declining values of Jersey property did occur two centuries ago, which explains the whole problem with *rentes*, with annuities which are fixed on the land. So, if you go through this process and you end up with no-one taking the land, you then have to subject the seller of that land to a *dégrèvement* procedure and you can go up and up in the chain of title. It might have had a logic then, but, when we're talking about insolvencies, they're not just pure land-based procedures. Furthermore, remember that *dégrèvement* is a procedure that can be employed in the case of a succession where the heirs fail to take and there are a number of other routes into the *dégrèvement* that are not insolvency driven. But, the idea that you would subject the seller of the land, when the buyer is the insolvent party, to the *dégrèvement* process strikes me as being very, very strange.

There's also the problem that these procedures were designed to apply to individuals. Although the interpretation legislation says that an individual person and a legal person are to be treated in similar ways, the way that the procedure applies to companies is a very, very difficult one, but we are seeing it more and more, because of the convenience of the *dégrèvement*, which is largely in avoiding the Viscount's fees and costs and, in fact, putting the procedure into the hands of the creditor's lawyers, who essentially drive the process. It's cheaper, it's far more convenient, it's faster, you don't have to pay these elevated fees: 10% plus 2½% and, of course, it's something that's within your control (as a creditor), as opposed to being administered by the Viscount, no matter how well he might do it.

When you benchmark *désastre* against international bankruptcy norms, there are a number of very, very critical issues that can be raised. Richard Falle mentioned the idea of estate augmentation and adjustment, so I'm going to mention clawbacks: how do we get that property back that the debtor may have disposed of? What about onerous property: what if the property that is subject to

⁹ 2008 JLR Note 49.

¹⁰ The term in French, *dégréver*, from which *dégrèvement* comes, means to "un-burden" or "un-carve".

dégrèvement is one that is too dangerous for the creditors to take? How far back up the chain of title do we go before ultimately we get *bona vacantia* and the Crown takes it? In such a case, would the Crown ever want it?

Now, the biggest problem with the *dégrèvement* procedure is: “the winner scoops all”. I don’t know whether the *pactum commissorium* ever made it to Jersey as part of this diffusion of customary law. The *pactum commissorium* is an old Roman law principle that the creditor cannot simply arrogate to itself the debtor’s property without an adjudication by the court. The Italian Civil Code and the French Civil Code, particularly (in the case of the latter) after the reforms to the law of security in 2006, have now allowed for limited exceptions to the principle, provided there is court supervision in the process. When you look at the Security Interest (Jersey) Law 2012, it now allows for appropriation of the collateral as one of the remedies available to creditors. But, in the *dégrèvement* system, it’s literally winner scoops all. So, if there is a substantial equity, it goes to the successful bidding creditor. What happens to the unsecured creditors? Well, they get nothing, they get absolutely nothing and the debtor gets no benefit from any surplus equity that might arise.

In the case of the unsecured creditors, there’s quite clearly a breach of the *pari passu* principle. In the case of the debtor, well, you might say it’s a bit like the foreclosure element in English law: they bargained this way, it’s just tough luck that they have to lose that right. But, more importantly (and this is perhaps where human rights might kick in) is that the law on *désastre* contains a very useful Article 12, which creates a homestead exemption, offering some spousal protection. That is something that is wholly missing from the *cession* and *remise* processes. It’s very difficult to see how these can possibly articulate with the spousal protection system, because, outside the statute, there isn’t a generally known customary law right to this form of protection, unless of course you can negotiate your way in the labyrinth between common property, jointly held property and property *en indivision*.

To wind up, just simply to note that the *Re Estates*¹¹ case is a bit of an anomaly, because it gives to the foreign creditor rights that a local creditor in a similar situation simply does not have without opening a *dégrèvement* process, thus subjecting them to a possible discrimination in comparison to a foreign creditor. So, that essentially is what is happening in Jersey in respect of insolvency with the real property component. Thank you very much for your attention.

¹¹ *Re Estates and General Developments Limited (in liquidation)* [2013] JRC 027 (4 February 2013). See, by this author, a case comment, published as: A Jersey Perspective on Cross-Border Insolvency: Article 49 and Receivers (2013) 17 JGLR 131.